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IN THE

Supreme Court of the United States

October Term, 1947

No. 546

GRACE W. YORK,

Plaintiff,

and

EDWARD M. STEELE and HENRY M. STEELE, as Executors of the Estate of Emma W. Steele, GUS STERN, LESLIE M. O'CONNOR, Secretary and Treasurer of "Baseball", a voluntary association created under an agreement of January 12, 1921, and FIRST NATIONAL BANK OF STILLWATER, OKLAHOMA,

Petitioners,

against

GUARANTY TRUST COMPANY OF NEW YORK

BRIEF OF GUARANTY TRUST COMPANY OF NEW YORK IN OPPOSITION

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Attorneys for Guaranty Trust Company of New York.

New York, February 20 1948.

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IN THE

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GRACE W. YORK, *Plaintiff,* and EDWARD M. STEELE and HENRY M. STEELE, as Executors of the Estate of Emma W. Steele, GUS STERN, LESLIE M. O'CONNOR, Secretary and Treasurer of "Baseball", a voluntary association created under an agreement of January 12, 1921, and FIRST NATIONAL BANK OF STILLWATER, OKLAHOMA, *Petitioners,* *against* GUARANTY TRUST COMPANY OF NEW YORK	No. 546

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF GUARANTY TRUST COMPANY OF NEW YORK IN OPPOSITION

Opinions Below

The opinion of the District Court for the Southern District of New York (R. 157-65) is not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 173-5) is reported in 164 F (2d) 387.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 8 1947 (R. 175). The petition for a

writ of certiorari was filed on January 23 1948. The jurisdiction of the Court is invoked under §240(a) of the Judicial Code as amended by the act of February 13 1925.

Questions Presented

Petitioners' statement of questions presented (p. 4) is confusing and inaccurate. The only questions which could be claimed to arise from this record are:

1. Whether a Circuit Court of Appeals can properly determine the absence of Federal jurisdiction in a case in which the defendant, having questioned the jurisdiction in the District Court, fails to appeal with respect to a decision of the District Court in which it assumed jurisdiction.

2. Whether in a "spurious" class suit each party electing to join as a co-plaintiff, must meet the jurisdictional requirements.

Previous Proceedings

This petition is filed by the petitioners[1] in the latest of a series of actions based on the conduct of Guaranty Trust Company of New York, trustee under an indenture dated May 1 1930 securing 5% notes of Van Sweringen Corporation, in connection with the offer which that Corporation made October 29 1931 to exchange the notes against pay-

[1]The original plaintiff York is not one of the petitioners. She did not appeal to the Circuit Court of Appeals from the final judgment of the District Court dismissing the amended complaint as to her and the petitioners on the ground of the New York statute of limitations (R. 2, 165-6), after the mandate of this Court (326 US 99) on the subject.

ment 50% in cash and 50% in stock and which the Trustee supported as being in the interest of the noteholders. The great majority of the noteholders accepted the offer, but the petitioners as well as the plaintiff York (not a petitioner) failed to do so.

1. The first suit was brought in April 1940 by Hackner and other noteholders who had accepted the offer and was predicated on claims of fraud and misrepresentation in connection therewith by Guaranty Trust Company and others. This suit was ultimately dismissed as to all the plaintiffs, except a subsequent plaintiff Eastman, for lack of Federal jurisdiction, 117 F(2d) 95 (CCA 2, 1941). This Court denied certiorari, 313 US 559.

2. The case of the accepting noteholders was then continued by Eastman, and in that case Guaranty Trust Company obtained summary judgment on the merits in the District Court (43 F Supp 637). The Second Circuit Court of Appeals affirmed, 130 F(2d) 300 (1942). This Court denied certiorari, 317 US 691, and also denied rehearing.

3. Grace W. York, although a non-accepting noteholder, had after the inception of the Hackner suit, No. 1 above, joined as plaintiff, but this suit was dismissed as to her also for lack of Federal jurisdiction (117 [F 2d] 95), part of the decision which this Court refused to review in 313 US 559. York then in January 1942 began action No. 3, a class suit on behalf of the non-accepting noteholders (R. 1). The record being substantially the same, the District Court again granted summary judgment upon the motion of Guaranty Trust Company. This time, however, the Second Circuit Court of Appeals (one judge dissenting) reversed and remanded the case for trial. Upon Guaranty Trust

Company's petition for certiorari, this Court granted the writ (323 US 693) limited to the single question whether Federal courts in diversity suits in equity might depart from the statute of limitations applied by the State courts of the forum in like circumstances. Pursuant to the decision of this Court on that point, 326 US 99, the case was remanded (1945) to the District Court for further proceedings in accordance with the opinion of this Court.

4. After remand and about October 29 1945 (i. e. more than five years after the inception of the series of actions and exactly 14 years after the transaction complained of) the five petitioners above named joined as co-plaintiffs in the York action (R. 1-2). Thereupon an amended complaint was filed in the District Court by all six plaintiffs, to which Guaranty Trust Company filed an answer (R. 2). Notwithstanding new allegations applicable to the new plaintiffs and the addition of some evidentiary details, the amended complaint (R. 3-41) was substantially the same as the original York complaint.

Guaranty Trust Company then moved in the District Court, upon the same record as in the *Eastman* case (No. 2 above) together with additional papers, for judgment of dismissal as against the petitioners above named for lack of Federal jurisdiction (R. 83-5), for judgment against all plaintiffs on the statute of limitations, and for judgment against the plaintiff York on the further ground of lack of capacity to sue. The District Court dismissed on the ground of the New York ten-year statute of limitations (R. 157-65) without discussing the jurisdictional question. Final judgment was thereupon entered in favor of Guaranty Trust Company of New York (R. 165).

5. The plaintiff Grace W. York did not appeal from this judgment of dismissal (R. 2), does not petition this Court

with respect thereto, and as to her the judgment is beyond the possibility of review. But the petitioners[2] above named, who joined with her as plaintiffs October 29 1945, did appeal to the Second Circuit Court of Appeals on every possible ground. The Circuit Court held that as to four of the five appellants the District Court lacked jurisdiction in the absence of the requisite jurisdictional amount and as to the fifth, "Baseball", an unincorporated association, there was no diversity of citizenship. The Court thereupon remanded the suit to the District Court with directions to dismiss for lack of jurisdiction (R. 175). A petition for rehearing was filed and promptly denied (R. 177-86).

Essential Facts

The facts relating to jurisdiction are not disputed. Four of the five plaintiffs admittedly hold $3,000 or less principal amount of Van Sweringen Corporation notes (R. 4-5). As to the fifth, "Baseball", diversity of citizenship does not exist as between its members and the defendant (R. 87-8, 174-5). The statement of facts surrounding the exchange offer set forth in the petition and supporting brief is not only confused but in many particulars inaccurate. But since the facts relative to the making of this offer are immaterial to the consideration of the questions actually tendered by the petition, we do not burden the Court with our own recital.[3]

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[2]We overlook the fact that the original co-plaintiff Emma W. Steele has died in the interim, and that her estate has been inserted in the caption as petitioner, *vi et armis*, without formality of any proceedings in the action.

[3]These facts are accurately stated in the affidavits of Messrs. Shriver, Whitney and Burke at pp. 15-49 of the record in the Hackner (Eastman) case (filed in this Court with the York record, Oct. Term 1944 No. 264), which are part of the record here (R. 83).

Argument

POINT I

THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT COULD PROPERLY CONSIDER AND DETERMINE WHETHER THE DISTRICT COURT HAD JURISDICTION OVER THE SUBJECT MATTER OF THE INSTANT ACTION WITH RESPECT TO THE PETITIONERS.

As a ground for granting certiorari the petitioners advance the extraordinary contention (pet. p. 5; br. pp. 15-19) that the Circuit Court had no power or right to determine whether the District Court had jurisdiction of the action because defendant did not cross-appeal from the judgment in its favor dismissing the action as barred by limitations. It is elementary that lack of Federal jurisdiction may be raised at any stage of the proceedings in a particular case. It can not be conferred by act of the parties, and an appellate Federal court *must* satisfy itself not only of its own jurisdiction, but also of that of the lower court in a cause under review. This it may do at the instance of a party or on its own motion. *Mitchell* v. *Maurer,* 293 US 237, 244; *Matson Navigation Co.* v. *United States,* 284 US 352, 359; *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 US 10, 18; *Chicago, Burlington & Quincey Ry. Co.* v. *Willard,* 220 US 413, 419.

In inquiring into the existence of Federal jurisdiction here the Circuit Court of Appeals followed this established jurisdictional rule. Its decision not only does not conflict with any holdings of any other circuit or of this Court, but is in full accord with the principle of law announced in the

cases above cited and numerous others decided by this Court and the various Circuit Courts of Appeal. Petitioners mistakenly cite (pet. p. 5) *Ostrander-Seymour Co.* v. *Grand Rapids Trust Co.*, 50 F (2d) 567, decided by the Sixth Circuit Court of Appeals, *Stoll* v. *Gottlieb*, 305 US 165 and *Heiser* v. *Woodruff*, 327 US 726 as being contrary to the decision of the Circuit Court in the case at bar. These decisions are wholly inapposite. In the *Ostrander-Seymour Co.* case plaintiff had questioned the jurisdiction of a Michigan State court in a receivership proceeding without success, and then in a subsequent action in the Federal court had again sought to relitigate the same question. The Sixth Circuit Court of Appeals properly held that the State court judgment was *res judicata.* The *Stoll* case presented the reverse situation. The doctrine of *res judicata* was there invoked by this Court to prevent Stoll from again raising in a State court action a judisdictional question which had been decided against him in a previous suit in the Federal court. *Heiser* v. *Woodruff* did not even involve a question of jurisdiction. This Court there held that a Federal bankruptcy court must apply the principles of *res judicata.*

POINT II

IN THIS ACTION, WHICH IS OF THE "SPURIOUS" CLASS TYPE, THE PETITIONERS AS CO-PLAINTIFFS HAD TO MEET THE JURISDICTIONAL TEST.

Concededly none of the petitioners could satisfy the Federal requirements of jurisdiction. Four lacked the requisite jurisdictional amount, and the fifth lacked diver-

sity of citizenship with defendant (R. 174-5; 164 F [2d] at 388-9).

The petitioners have completely misinterpreted the decision of the Circuit Court of Appeals which they ask this Court to review. They incorrectly state (pet. p. 5; br. pp. 20-3) that the Circuit Court held that other parties could not *intervene* when they failed to measure up to the requisite jurisdictional standards. An examination of the opinion (R. 173-5; 164 F [2d] 387) will demonstrate that the Circuit Court made no such holding. It decided merely that, where parties join as co-plaintiffs, each must have the necessary jurisdictional requirements.

The petitioners here did not intervene in the suit pursuant to Rule 24 of the Federal Rules of Civil Procedure, but became additional parties plaintiff when they joined the suit *via* an amendment to the complaint in October 1945 in accordance with Rule 20 of the Federal Rules of Civil Procedure (R. 1-2). Where plaintiffs join as parties in an action as permitted by this rule, each must meet the jurisdictional requirements. *Clark* v. *Paul Gray, Inc.*, 306 US 583, Moore 2 *Federal Practice* pp. 2184-5. This same principle is also applied in representative suits of the "spurious" class type such as the present one.[4] *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F (2d) 819, 822, cert. den. 323 US 779; *Fechheimer Bros. Co.* v. *Barnwasser*, 146 F (2d) 974, 976; *Hackner* v. *Morgan*, 117 F (2d) 95, cert. den. 313 US 559.

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[4]A "spurious" class action is maintainable under Rule 23 (a) (3) of the Federal Rules of Civil Procedure where the rights of the members of the class are several, and there is a common question of law or fact affecting the several rights. On the prior appeal the Circuit Court found that the instant suit was of this type (143 F. [2d] at 528).

In making its decision here the Circuit Court of Appeals followed this well-settled rule. It did not hold contrary to its own decision on the prior appeal as petitioners erroneously contend (pet. p. 5; br. p. 20). There the Circuit Court (143 F [2d] at 529) merely suggested that if, after trial, the court should find against the defendant, appropriate steps be taken to notify all non-accepting noteholders to intervene if they had not theretofore done so.

The decision which petitioners seek to have reviewed by this Court likewise does not conflict with any decision of the Third Circuit, as petitioners claim (pet. 5; br. pp. 20-3). In this connection they cite *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F Supp 870, decided by a District Court in Pennsylvania. But in that case the parties sought only to intervene under Rule 24, and did not become co-plaintiffs as did the petitioners here.

POINT III

THE DECISION OF THE DISTRICT COURT DISMISSING THE ACTION UNDER THE STATUTE OF LIMITATIONS IS NOT PERTINENT HERE.

We fail to understand why the petitioners devote pages 23-39 of their brief in arguing that the District Court erred in holding the action barred by the New York ten-year statute of limitations. The petition does not state this as a reason for allowing the writ (pet. p. 5), the statute of limitations is not listed under the heading of "Questions Presented" in the petition (p. 4), and this Court is not requested to issue a writ of certiorari to the District Court. In fact this Court would have no power to direct the issuance of a writ to the District Court for the purpose of

reviewing its decision (§ 240 of the Judicial Code as amended by the Act of February 13 1925). We therefore see no necessity for discussing the arguments made by petitioners with respect to the application of the New York statute of limitations by the District Court.

Conclusion

This case does not raise questions of any special gravity or general importance. The legal questions presented are elementary. The decision of the Circuit Court of Appeals, which petitioners desire to have reviewed, is in complete accord with the law of jurisdiction as announced by decisions of this Court and does not conflict with the decisions made by Circuit Courts of Appeals in other circuits. There has been no misinterpretation of the Federal statutes or the Federal Rules of Civil Procedure.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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New York, February 20 1948.

APPENDIX

Rules of Civil Procedure for the District Courts of the United States

"Rule 20. Permissive Joinder of Parties.

(a) PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

* * * * * *

"Rule 23. Class Actions.

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

* * * * * *

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

"Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. . . ."